Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WANDA SMIAROWSKI – PETITIONER

PHILIP MORRIS USA RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WANDA SMIAROWSKI
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Questions Presented

1. Whether prima facie proof of age discrimination, together with insufficient evidence to support the employer's pro-offered reason for an adverse employment action, (i.e. Respondent has not offered sufficient evidence from disinterested witnesses) should result in the Court's rejection (the Court granted Respondent's motion) of Respondent's motion for summary judgment as a matter of law of intentional discrimination in violation of the Age Discrimination in Employment Act.

2. Whether Respondent presented sufficient evidence to be awarded summary judgment as a matter law under Federal Rules of civil Procedure no. 56. The court cannot conclude, as a matter of law, that the evidence established that the employer acted for an unstated, nondiscriminatory reason unless no reasonable jury could find otherwise. In reaching that conclusion, the court must consider the evidence in the light most favorable to the applicant (i.e. Petitioner) (as the non-moving party) and the court must give the applicant the benefit of all justifiable inferences that may be drawn from the evidence.

3. Whether in granting Respondent's a motion for summary judgment as a matter of law under Federal Rule of Civil Procedure 56, the district and appeals courts in the second circuit corrected considered settled law/court opinions and decisions .

4. Whether the information in the affidavits of Respondent's employees should be considered as coming from interest witnesses – and be subject to creditable review by the Court and others. This includes but is not limited to the influence by Respondent's management and other decision makers at Respondents have on Respondent's employees.

5. Whether one of the decision maker's age of over 50 could influence the information/data she provided in her affidavit.

6. Whether Respondent's testimony in their affidavits and before various Judges stating that Keyword Skills were only used for position and regarding **no automatic search** is credible. This is questionable especially given the powerful search capacities of technology.

7. Whether the employment practice and/or test using of such an age related question is unacceptable given previous court's rulings/decisions/opinion.

8. Conflict in rulings between two Circuit Court regarding question on an employer's employment application for which age category can be determined.

9.. Whether the question "Year you started working professionally" on Respondent's employment application has an adverse impact on older applicants seeking employment with Respondent. It is a forbidden employment practice. The District Judge in his Memorandum and Order quoted from EEOC documents that such a question can discourage older applicants from applying.

Parties

The Parties listed on the cover are all the parties to this action.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix B-1 and is

Is unpublished

The opinion of the United States district court appears at Appendix A to the petition and is

Is unpublished

JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals decided my cased was July 6, 2005

A timely petition for rehearing was denied by he United States Court of Appeals on the following date: December 4, 2006 and a copy of the order denying rehearing appears at Appendix C-1

Summary of Reasons to Grant Petition

The District Court erred in awarding Respondent summary judgment as a matter of law since opinions/decision of the U.S. Supreme Court and other Court are sufficient as a matter of law to defeat Respondent's motion for summary judgment.

This case concerns: **(A)** that the decision of the second circuit conflicts with decisions of this court regarding the application of rulings/opinions/decisions to defeat Respondent's motion for Summary Judgment which asks for findings of no violation of the Age Discrimination in Employment Act of 1967(ADEA) U.S.C. 621 et seq. which prohibits discrimination in employment on the basis of age The courts have applied the same standards of proof under the ADEA as under Title VII of the Civil Rights Act of 1964. **(B)** resolving the differences in rulings by two circuit courts about a question from which age approximation can be made on the Respondent's employment application. Then this information can be used for discriminatory purposes.

A.1 Petitioner who is well over 40 and is acting as pro-se, has presented evidence sufficient for prima facie proof that Respondent discriminated against her based on age. The District Judge in his Memorandum and Order has ruled that as a matter of law he can not rule that Petitioner is not qualified for the positions for which she applied and were listed in her joint complaint. These positions which were filled were filled by individuals under 40.

A.2 Respondent has not met it's Burden Shifting obligation. Respondent has not proved by a preponderance of evidence that it did not apply forbidden factors in it's decision. It only presented affidavits from two of it's employees – who are interested witnesses.

A3. Respondent has not shown that at the moment of decision, that it did not solely use a legitimate non-discriminatory criteria – mixed motive. The reason Respondent offered is an after the fact pre-text one.

A5. The effect of the employer action of using the forbidden question "Year you started working professionally" on it's employment application has a negative one on the applicants. It signals older applicants and can discourage them from applying. This is highlighted in the Equal Employment Opportunity Commission (EEOC)'s documents and is also referred to in the District Judge's Memorandum and Order of July 5, 2005. This has a disparate impact.

B1. The courts in the Seventh circuit have considered such a question on an employment application in which age can be approximated as prohibited and have so ruled. This knowledge allows an employer to discriminate against applicants/ candidates/individuals in violation of ADEA. The Courts in the Second circuit have taken another approach.

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on September 15, 2006 by the United States Circuit Court of Appeals for the Second Circuit, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. Section 1254(1). This Petition is timely filed because it was mailed within ninety days of December 4, 2006, the date a motion for rehearing was denied in the court below

Background

Petitioner, acting as pro se, was born on August 8, 1947 and is over 50 years of age. She saw "Help Wanted" advertisement in a newspaper directing applicants to respondent Philip Morris USA's web site to fill out an on-line application to apply for the position. Other options for applicants such as mail, fax, in person were not listed.

The respondent's web site under the Career section had a link which brought applicants to the employment application – which had the label "Hiresystems" (now known as BrassRing) at the www address – the name of the vendor. (App. D-1)

Petitioner filled out the on-line application. Between August 21, 2002 and February 7, 2003, Petitioner applied for a number of positions using Defendant's web site. Plaintiff is qualified for these positions. Petitioner was not invited to interview with nor was hired by Defendant.

This is not only a case about a company using information on an employment application to discrimination but also about using the powerful resources of the computer to easily do so.

Question on Respondent's Career Portion Web Site

Respondent on the career portion of their web site has the question:

"Year you Started Working Professionally" (App. D-1)

This question allows Respondent to calculate Petitioner's or any other applicant's age category (ex.. over 40) and to unlawfully act upon that information. Of course, as with anything it may not be 100% accurate. *See discussion in Job Application section*

This is not a facially neutral employment practice.

In **Title 29: Labor,** PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT , Subpart A—Interpretations § 1625.5 Employment applications. " A request on the part of an employer for information such as "Date of Birth" or "State Age" on an employment application form * * * the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age * * *That the purpose is not one proscribed by the statute should be made known to the applicant, either by a reference on the application form to the statutory prohibition in language to the following effect::

The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age," or by other means. The term "employment applications," refers to all written inquiries about employment or applications for employment or promotion including, but not limited to, résumés or other summaries of the applicant's background. It relates not only to written pre employment inquiries, but to inquiries by employees concerning terms, conditions, or

privileges of employment as specified in section 4 of the Act. [46 FR 47726, Sept. 29, 1981, as amended at 53 FR 5972, Feb. 29, 1988]

In the documents provided to the Petitioner by the Respondent (many by the order of the Honorable P. Kevin Castel of the United States District Court of the Southern District of New York [District Court] , the vendor states that fields are mandatory – i.e. the application will not be accepted if the fields are not completed; if the applicant does not complete the mandatory fields, it will be rejected and he/she has not submitted an application

NYSDHR, EEOC and Court Filings

Petitioner filed a joint complaint with the New York State Division of Human Rights (NYSDHR) and the Equal Employment Opportunity Commission (EEOC) stating that the Respondent violated the NYSDHR Law and the ADEA in discriminating against her based on age.

Stating "insufficient evidence", they issued a "Right to Sue" letter to the Petitioner. Petitioner filed a case in the District Court alleging age discrimination. The District Court granted summary judgment to Respondent Philip Morris USA. This was affirmed by the Court of Appeals for the 2nd Circuit. A Petition for Rehearing filed by the Petitioner was denied.

Pro –Se

In at least two Circuit Courts "where a plaintiff appears pro se, a Court must "read the pleadings * * * liberally and interpret them to raise the strongest arguments that they suggest" McPherson v Coombe 174 F3d 276, 280

(2nd Cir. 1999); Burgos v Hopkins 14 F. 3d 787, 790 (2nd Cir. 1994)

In Cottrill (now Fagan) v Cottrill, SUPREME COURT OF APPEALS OF WEST VIRGINIA, No. 32785, (2006) Civil Action No. 80-C-385-4, "where a *pro se* litigant does not have the legal training to recognize and put the correct name to an absolute defense before him, we find that a "skeletal argument" is enough to preserve a claim * * * This is not a new notion. In *Hedrick v. Hedrick*, 218 W. Va.116, 624 S.E.2d 463 (2005), we held that it is sufficient for a party to informally plead . * * *

The court should strive, however, to ensure that the diligent *pro se* party does not forfeit any substantial rights by inadvertent omission or mistake. *** justice is served by reasonably accommodating all parties, whether represented by counsel or not. This 'reasonable accommodation' is purposed upon protecting the meaningful exercise of a litigant's constitutional right of access to the courts." (Blair v Maynard, 174 W. Va. 247, 253, 324 S.E.2d 391, 396 (1984).

ADEA/Title VII

In McKrennon v Nashville Banner Publishing Co. 513 U.S. 352 (1995), Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* (1988 ed. and Supp. V). "Under the ADEA, it is "unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). " (Reeves v Sanderson Plumbing Products, 530 U.S. 133 (2000).

The substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985); *Lorillard* v. *Pons*, *supra*, at 584. " (McKrennon v Nashville Banner Publishing Co., 513 U.S. 352 (1995),

"see Fair Labor Standards Amendments of 1966, Pub. L. 89—601, §606, 80 Stat. 845, ... As enacted in 1967, §4(a)(2) of the ADEA, now codified as **29 U.S.C. § 623**(a)(2), provided that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities * * * because of such individual's age ... ." 81 Stat. 603. Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in §703(a)(2) of the Civil Rights Act of 1964 (Title VII)." (Smith v city of Jackson 544 U.S. 228 (2005)

Agent

Hiresystems (aka Brassring), with it's name is on the www address on the Respondent's on-line application form (reached by following links on Career section of Respondent's web site), may be viewed as the Respondent's agent

In a number of it's decisions including (General Dynamics Land Systems, Inc. v. Cline et. al., 540 U.S. (2004) the Courts have referred to definitions from dictionaries. In the Random House Compact Unabridged Dictionary, 2nd Ed., 1987, an agent is defined as "a person or business authorized to act on another's behalf."

"[T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII ... 45 Fed.Reg. 74676 (1980). " (Meritor Savings Bank v Vinson, 477 U.S. 57 (1986), Marshall, J., Concurring Opinion)

McDonnell Douglas v Green
Prima Facie Case

Plaintiff meets the criteria to establish a Prima Facie Case of Age Discrimination as outlined in McDonnell Douglas Corp v Green, 411 U.S. 792, 36 L. Ed 668, 93 S.Ct. 1817 (973).

- Petitioner is over 40 years of age
- Petitioner applied for employment for specific jobs
- Petitioner's qualifications met employer's legitimate expectations
- Petitioner suffered an adverse employment action
- positions for which petitioner applied which were filled were filled by individuals under 40

"a prima facie case is established when an applicant is 'rejected under circumstances which give rise to an inference of unlawful discrimination." Texas Dept. of Community Affairs v Burdine, 450 U.S. at 253 (1981). Petitioner was not invited for an employment interview nor was she hired.

Petitioner's qualifications met employer's legitimate expectations. In his Memorandum and Order of the Honorable P. Kevin Castel, dated July 5, 2005 wrote: "Ms. Smiarowski's professional and academic background is extensive and she has a Master's degree in accounting, an M.B.A. in finance and worked more than 15 years in fields

including financial analysis (Smiarowski Aff. 15 – 177). Without further information as the defendant's hiring criteria, the record before me would permit a reasonable jury to conclude that the plaintiff was a qualified job applicant. Consequently, I can not rule, that as a matter of law Ms. Smiarowski was not qualified for the positions she sought at Philip Morris" (App A - pg. 7)

The positions (based on the Requisition numbers) for which the Petitioner applied and were listed in the EEOC complaint, which were filled by the Respondent were filled by individuals under the age of 40 – age 36 and younger.

"Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class. * * * [2] See, *e.g.*, *Roper* v. *Peabody Coal Co.*, 47 F. 3d 925, 926-927 (CA7 1995); *Rinehart* v. *Independence*, 35 F. 3d 1263, 1265 (CA8 1994), cert. denied, 514 U. S. ___ (1995);" (O'Connor v Consolidated Coin Caterers Corp., 517 U.S. 308 (1996).

Please note – that Responder Philip Morris supplied additional documents for people hired for position requisition numbers for which petitioner did not apply and did not list on her joint complaint with New York State Human Rights Commission and the Equal Employment Opportunity Commission . These other hires had start dates months after petitioner filled her joint complaint in March 2003.

Burden Shifting

Petitioner has made out a prima facie cased under McDonnell Douglas Corp v Green U.S. 792 (1973) which respondent has not effective rebutted with evidence/testimony from disinterested witnesses as required by previous Court rulings.

In Reeves v Sanderson Plumbing Corp. (99-536) 530 U.S. 133 (2000) " The court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from **disinterested witnesses**.'" *Id.* (quoting 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, at 300 (2d ed. 1995)). [emphasis added]

In Texas Dept. of Community affairs v Burdine, 450 at 250 "after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the [employer] to persuade the court by a **preponderance of the evidence** that legitimate, nondiscriminatory reasons for the challenged employment action existed." [emphasis added]

That Defendant did not provide any permissible/non-discriminatory reason for the question "Year you started working professionally" (App. D-1) which is part of the employment application.

Referring to Furnco, 483 U.S. at 580. because the evidence did not conclusively establish that respondent did not interview or hire petitioner for a nondiscriminatory reason, respondent was not entitled to summary judgment as a matter of law.

Affidavits from two of Respondent's Employees Interested Witnesses

Respondent has only presented to the Court affidavits from two of it's employees – these are not **disinterested witnesses**. – Joyce Hoggard and Bonnie W.O'Briant.

In Furnco Construction Vs Waters U.S. 483 U.S. at 567, 580 "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting "

It is reasonable to suppose that management's influence on employees at Respondent's company is so strong that other "decision makers"/employees simply ratify age based decisions not to hire or to limit the hiring of older workers. And that would be reflected in the affidavits offered by Respondent's employees. Such an influence is shown in Anderson v Bessemer City, 470 U.S. 564, 579 – 580 (1985) (upholding finding of discrimination on evidence that two of five members of selection committee had discriminatory inclinations).

Here, as well, the influence of management/" decision makers" is so strong that employees followed management's preference.. Additionally, it is not unreasonable to suspect that the two employees (one in her 50's), especially realizing the small demand for older workers in the job market , took care to protect their jobs with benefits, including retirements ones. There is credibility regarding respondent's employees statements in their affidavits..

"Senate Hearings 34 (statement of Sen. George Murphy) ("[A]n older worker often faces an attitude on the

part of some employers that prevents him from receiving serious consideration or even an interview in his search for employment"). ***. See, *e.g.*, House Hearings 45 (statement of Norman Sprague) * * * The record thus reflects the common facts that an individual's chances to find and keep a job get worse over time; as between any two people, the younger is in the stronger position, the older more apt to be tagged with demeaning stereotype.* * * and "the incidence of unemployment, especially long-term unemployment[, which] is, relative to the younger ages, high among older workers,"" (General Dynamics Land Systems, Inc. v. Cline et. al., 540 U.S. (2004) at 589-90.)

Under Reeves v Sanderson Plumbing Products (99-536) U.S. 133 (2000) and in other Court decisions, only evidence of the moving party which is not contradicted and not impeached may be considered.. Under the standard set in the *Reeves* case, the Court is not allowed to consider evidence presented by the moving party in a motion for summary judgment that is contradicted or **presented by an interested witness**. [emphasis added]

The testimony in their affidavits by these "interested" witnesses can be viewed as self-serving (Anderson v Liberty Lobby, 477 U.S.242 (1986) at 300).

When findings are based on determinations regarding the credibility of witnesses , Rule 52(a) demands even greater deference to the trial court's findings; (Anderson v Bessemer City, 470 U.S. 564, 579 – 580 (1985) , Page 470, U.S. 564, 575). This is also applicable to the Court's decision to grant or deny a motion for summary judgment under Rule 56.

In documents presented to the Court, the Respondent has highlighted that one of the decision makers is in her 50's.

"[N}othing in Title VII necessarily bars a claim of discrimination "because of ... sex" merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.") Similarly, although proof that respondent retained other employees in their 50s and 60s in management positions, "is not wholly irrelevant on the issue of intent, *** such proof neither was nor could have been sufficient to **conclusively** demonstrate that [respondent's actions were not discriminatorily motivated." [emphasis added] Furnco, 483 U.S. at 580

"We have rejected any conclusion presumption that an employer will not discriminate against members of his own race. Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against others members of that group." Castaneda v Partida, 430 U.S. 482, 499 (1977) see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)

On-Line Resources/System

"Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. (Anderson vs Bessmer City Page 470, U.S. 564, 575)

"Human resource departments and recruiters using these online resources [third party providers] have been ``overwhelmed" with resumes.\12\ For example, it was reported that a major health care employer received 300,000 online resumes in one year. \13\ See Bruyere & Erickson, supra note 8, at 23.

* * * systems * * * allowing employers to * * * receives and evaluates electronic applications and resumes . * * * an employer could have the group of job seeker **profiles** from a third party provider's system searched, as well of those received on its own corporate Web site * * * The system would then pull a certain number of **profiles** that meet the employer- designated criteria (usually a particular skill set) and forward those **profiles** to the employer for consideration {emphasis added] * * *

* * * [for example] The employer authorizes the hiring of three new printers at one of the plants. To identify job seekers, * * * the employer searches the database to identify job seekers with two years printing experience. (EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 29 CFR Part 1607, [OMB Number: 3046-0017]),

Based on affidavits submitted and Respondent's testimony before Judge P. Kevin Cahil at conferences Respondent expects court to believe that it uses **no automatic** search criteria (as per affidavit of Bonnie W. O'Briant in which she states: "...no automatic search criteria which all persons in a position to screen resumes... are encouraged to use, invited to use or told they must use"). Respondent, in fact, identified only one set of "**keyword skills**" it used for one requisition position. The Respondent expects the court to believe that they do not use the features (see App. D-2) of the computer technology which they have acquired which gives them the ability to easily do so– especially given the volume of resumes they receive .

Assume that it takes one person 5 minutes to read/scan an application submission/resume looking for a good fit for job specifications/qualifications. In an eight

hour day that person can manually process 96 resumes. In a year assuming 48 work weeks, that person would handle about 23,000 application submissions/resumes.

In the July 20, 2004 conference as recorded in the transcript, Joseph Harper is identified as that individual. Assume that Joyce Hoggard, who, according to the affidavit she submitted, reviewed petitioner's credentials, also reviews applicant submissions, the number of application submissions/resumes reviewed still is only 46,000 a year. That this is **all** these two individuals are doing 8 hours a day.

While this number of applications is sizeable, given the size, reputation, salary and benefit packages of Respondent Philip Morris USA, it probably represents just a small percent of application and resume submissions – just a drop in the bucket.

Please note, that the Petitioner at the July 20, 2004 conference asked for a clarification of the Affidavit statements. The judge did not grant that request.

Solely Because of

"turn our attention to the actual moment of the **[p241]** event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether **gender** was a factor in the employment decision *at the moment it was made.* Moreover, since we know that the words "because of" do not mean "*solely* because of,"[n7] we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both **gender** and legitimate factors at the time of making a decision, that decision was "because of " sex and the other, legitimate considerations -- even if we

may say later, in the context of litigation, that the decision would have been the same if **gender** had not been taken into account.. * * * the employer **[p253]** * * * , proving "'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'" ***Givhan***, 439 U.S. at 416, quoting *Ayers v. Western Line Consolidated School District,* 555 F.2d 1309, 1315 (CA5 1977). An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. [at the moment the decision was made] Finally, *an employer may not meet its burden in such a case by merely showing that, at the time of the decision, it was motivated only in part by a legitimate reason.* [emphasis added] The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing Judge Gesell that **Hopkins'** interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision." (Price Waterhouse vs Hopkins 490, U.S. 238.)

"direct evidence of discrimination is not required in mixed-motive cases" (Desert Palace, Inc. V. Costa (02-679) 539 U.S. 90 (2003) , 299 F.3d 838

Additionally Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. An impermissible motive must be absent. The Respondent has not proved this with evidence from disinterested witnesses.

Respondent is only offering a pretext – a reason after the fact.. Referring to Dea V. Look, 810 F. 2d 12, 14-15 (1st Cir. 1987), this proffered justification is false and

discrimination is the real reason for the adverse employment suffered by the Petitioner.

Conflict between two circuit courts

There is a conflict between rulings in at least two Circuit Courts – the 7th and the 2nd.

In Mathis v Phillips Chevrolet (00 – 1892), the 7th Circuit) (2000) gave weight to a question [on Phillips Chevrolet) [employment] application form from which decision makers could estimate the age category of an applicant.

Information on an employment application was used to discrimination against an applicant "Mathis applied for a sales job at Phillips Chevrolet in response to a newspaper ad.* * * he applied for a job as a salesman at Phillips Chevrolet, Inc. ("Phillips"), Phillips never even interviewed him. Instead it hired seven younger, white salespeople." Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, (7th Cir. 2001)

"He left his application. * * * application form asked for the date of his discharge from the military. Mathis indicated that he was discharged in May 1959. * * * this information alerted Phillips to the fact that he was well over 40 years old. Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, (7th Cir. 2001)

The United States District Court for the Northern District of Illinois Warren K. Urborn District Judge, sitting by designation, entered judgment of jury verdict awarding Plaintiff $50,000 in compensation damages on age

discrimination claim and employer appealed the Court of Appeals, Diane P. Wood Circuit Judge ... Affirmed

"Courts in the circuit [2nd] have held that a request of a job applicant for his date of birth does not, in itself, violate the ADEA" (App A, page 7-8)

In his Memorandum and Order of the Honorable P. Kevin Castel, dated July 5, 2005 refers to "An EEOC regulation quoting from EEOC regulations: "the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age. * * *" 29 C.F.R. 8 1625.5 (app a – page 9)

The Equal Employment Opportunity Commission – 29 CFR Part 1625 – RIN 3046 – AA 78 , Coverage Under the Age Discrimination in Employment Act, Notice of proposed rulemaking, http://edocket.acces.gpo.gov/2006/E6-13138.html "In response to the Supreme Court ruling in General Dynamics Land Systems, Inc. v Cline, 540 U.s. 581, 586 (2004), the Commission [Equal Employment Opportunity Commission] is proposing changing some of its rules: "\ 7 \ ' ' It shall be unlawful for an employer * * * to print or cause to be printed or published, any notice or advertisement relating to employment by such an employer * * * or any classification or referral for employment * * * indicating any preference, limitation, specification, or discrimination based on age. ' ' 29 U.S.C. 623(e).

Therefore, an age related question that may discourage an older worker from applying is contrary to the ruling of the United Supreme Court.

This is an "employment practice which needs to be justified as applying to job performance." See. [Griggs v.

Duke Power Co., 401 U.S. 424 (1971)], The Respondent has not offered any justification.

If the Respondent wanted to ascertain if the applicant had the required number of years of experience for a particular job, the question could have been worded:

State Number of years of **applicable** experience:

not as they have done "Year you Started Working Professionally" (App. D-1)

"It is therefore the purpose of this [Act] [ADEA] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; * * * . 29 U.S. C..621(b) [General Dynamics Land Systems, Inc. v. Cline et. al., 540 U.S. (2004) at 589-90.

Employment Practice/Employment Action
Job Application/Employment Application

"The Act [Title VII of the Civil Rights Act of 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." [Griggs v. Duke Power Co., 401 U.S. 424 (1971)], The Court held that the "touchstone" for determining the validity of such tests is "business necessity." Ibid. "If an employment practice which operates to exclude negroes can not be shown to be related to job performance, the practice is prohibited." (*emphasis added)* ibid

"this Court unanimously held that Title VII of the Civil Rights Act of 1964 prohibits employment practices that have discriminatory effects, as well as those that are

intended to discriminate. *Griggs v. Duke Power Co.*, 401 U.S. 424 at 429-430(1971)" (Ward's Cove Packing Co., Inc. v Antonio 490 U.S. 642., Stevens J., Dissenting Opinion.)

'Title VII prohibits the use of practices, procedures, or tests that, although neutral on their face and in terms of intent, " . (*Griggs v. Duke Power Co* 401 U.S. 424, 430 (1971). "The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting 703(h) to permit only the use of job-related tests." *Ibid*,

If an employment practice and/or test has a disparate impact on a Title VII or ADEA protected group (such as individuals over 40), then the employer must be prepared to demonstrate how the practice and/or test is job-related and consistent with business necessity.

These rulings/decisions are also applicable to employment practices which would discourage older applicants from applying – refer to Title 29: Labor, PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT , Subpart A—Interpretations § 1625.5 Employment applications. "The application process itself might not adequately reflect the actual potential applicant pool, since, otherwise, qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory. *See Teamsters v. United States*, 431 U.S. 324, 365-367" (Dothard v Rawlinson 433 U.s. 321 (1977)

The new guidelines specify that online testing will be treated in the same manner as paper and pencil tests. (Agency Information Collection Activities: Adoption of Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on

Employee Selection Procedures as They Relate to the Internet and Related Technologies, 69 Fed. Reg. 10,152, 10,153 (Mar. 4, 2004) (to be codified at 29 C.F.R. pt. 1607, 41 C.F.R. pt. 60-3, 28 C.F.R. pt. 50, 5 C.F.R. pt. 300) [hereinafter Agency Information]. *Note 12, at 10,1*

"Are employment tests, including those administered online, subject to UGESP? A: Yes. Online tests, including tests of specific or general skills, are selection procedures rather than recruitment under UGESP because the test results are used as ``a basis for making employment decisions." The agencies that issued the Uniform Guidelines on Employee Selection Procedures (UGESP or Uniform Guidelines) (43 FR 38290 et. seq., August 25, 1978, 29 CFR part 1607, 41 CFR part 60-3, 28 CFR 50.14, and 5 CFR 300.103(c))

The Guidelines apply to employee selection procedures which are used in making employment decisions, such as hiring, * * * Employee selection procedures include job requirements (physical, education, experience), and evaluation of applicants or candidates on the basis of application forms, interviews, * * * and any other procedures used to make an employment decision whether administered by the employer or by an employment agency. (http://www.uniformguidelines.com/questionandanswers.html

Random House Compact Unabridged Dictionary, 2nd edition, 1987, defines test as "a particular process or method for trying or assessing *** a set of questions, problems, or the like, used as am means of evaluating the abilities, aptitudes, skills, or performance of an individual or group, examination.

Requiring the filling out of a "job application/ employment application" is an employment practice/ employment action and it is a pre-screening test for employment. Doing it on a company's web site, especially when it is required/mandatory is an on-line test. Therefore, if an employment practice acts to discourage older applicants it is prohibited.

"Congress has placed on the employer the burden of showing **[p666]** that any given requirement must have a manifest relationship to the employment in question." (Ward's Cove Packing Co., Inc. v Antonio, 490 U.S. 642 (1989), Stevens J. Dissenting Opinion)

"The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." ((Ward's Cove Packing Co., Inc. v Antonio, 490 U.S. 642 (1989))

Defendant has not shown that the employment practice – the question "Year you Started Working Professionally" on the pre-screening test – the employment application -- is related to job performance. Or that it is job related. (Griggs v. Duke Power Co., 401 U.S. 424 (1971))

Effects of Employer Action on employee
Disparate Impact

"We explained that Congress had "directed the thrust of the Act [ADEA] [to the *consequences* of employment practices, not simply the motivation." *Ibid.* [Griggs v. Duke

Power Co., 401 U.S. 424 (1971)], * * * Neither §703(a)(2) nor the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or age. *Ibid.* [Wilson v Fort Worth Bank & Trust 487 U.S. 977, 991 (1988) practices may be said to 'adversely affect [an individual's status] as an employee' " (alteration in original) (quoting 42 U.S.C. § 2000e—2(a)(2))). **Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.** [emphasis added] [Smith v City of Jackson 544 U.S. 228 (2005) **"we now hold that the ADEA does authorize recovery in "disparate-impact" cases** comparable to *Griggs*. " [emphasis added] (ibid.)

The agencies that issued the Uniform Guidelines on Employee Selection Procedures (UGESP or Uniform Guidelines) (43 FR 38290 et. seq., August 25, 1978, 29 CFR part 1607, 41 CFR part 60-3, 28 CFR 50.14, and 5 CFR 300.103(c)) * * * "All search criteria used are subject to disparate impact analysis" This type of search criteria would include that used to search on line web data basis including those of an employer for candidates/applicants for positions.

Also, employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures, **29 CFR § 1607.1** *et seq.* (1988), **[p658]** are required to maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group[s]. * * *...Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the

workforce; (Ward's Cove Packing Co., Inc. v Antonio (490 U.S. 642 (1989)

Please note that Plaintiff in her request for documents from Defendant asked for statistics. Defendant declined to provide same. Plaintiff also requested that Judge Castel instruct Defendant to produce same at the July 20, 2004 conference. At that time Respondent said that it was not a pattern or practice case – it is a disparate treatment one. Judge Castel did not instruct the Respondent to produce the statistics.

Conclusion

Referring to Furnco, 483 U.S. at 580. because the evidence did not conclusively establish that respondent did not interview or hire petitioner for a nondiscriminatory reason, respondent is not entitled to summary judgment as a matter of law. The judgment of the District Court and the Court of Appeals should be reversed and Petitioner's case should be reinstated. The petition for a writ of certiorari should be granted.

Respectfully submitted.

Wanda J. Smiarowski 4/12/07
260 – 14 83 Avenue
Floral Park, NY 11004
February 23, 2007

No. _____ }

IN THE }

SUPREME COURT OF THE UNITED STATES } Affirmation

WANDA SMIAROWSKI – PETITIONER } of

PHILIP MORRIS USA RESPONDENT } Wanda J.

ON PETITION FOR A WRIT OF CERTIORARI } Smiarowski
To UNITED STATES COURT OF APPEALS FOR }
THE SECOND CIRCUIT]

I, Wanda J. Smiarowski, pro-se, affirms and says as follows:

1. I am acting as pro-se and submit this affirmation in support of my Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
2. Attached hereto in Appendix D is a true and correct copy from the portion of Respondent Philip Morris USA Inc.'s employment application linked through their web site containing the question "What year you started working professionally.
3. Attached hereto in appendix D is a true and correct copy from documents Respondent provided to the Petitioner of List of Standard Searchable Fields/Search Criteria for on line systems.

Wanda J. Smiarowski
Floral Park, NY. 11004
February 23, 2007

4/12/07

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

WANDA J. SMIAROWSKI,
Plaintiff

04 Civ. 00074
(PKC)

-against-

MEMORANDUM
AND ORDER

PHILIP MORRIS USA INC.,
Defendant

----------x

P. KEVIN CASTEL, District Judge

Plaintiff Wanda J. Smiarowski, who brings this action pro se, alleges that defendant Philip Morris USA Inc. ("Philip Morris") violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. S 621 et. Seq., ("ADEA"). Read generously, she alleges that Philip Morris discriminated against her on the basis of age in not interviewing or hiring her for various positions within the company. In or around August 2002, the defendant ran a newspaper advertisement that solicited applications for a financial analyst position. (Complaint at 4) Smiarowski, who was born in 1947, saw the advertisement, and completed the on-line job application that asked the applicant to identify the "[y]ear you started working professionally." (Complaint at 4) She contends that the question was a disguised means for inquiring into her age, and that she was denied employment on the basis of her age. (Complaint at 3)

This action was filed on January 6, 2004. Discovery is closed. The defendant now moves for summary judgment, pursuant to Rule 56, Red. R. Civ. P., contending that there are no triable issues of fact and that the action should be dismissed. For the reasons explained below, the defendant's motion is granted.

Background

Between August 21, 2002 and February 7, 2003, Ms. Smiarowski applied for approximately 14 positions at Philip Morris USA Inc. ("Philip Morris") via the defendant's on-line application procedures. (Smiarowski Dep. At 68, 146) Smiarowski's job applications were reviewed by Joyce Hoggard, a staffing specialist in the defendant's human resources department. (Hoggard Aff. 2,4) Hoggard decided not to submit Smiarowski's applications to the hiring managers responsible for the eventual employment decisions. (Hoggard Aff. 6) In her affidavit, Ms. Hoggard states that she did not know Ms. Smiarowski's age at the time she reviewed her application. (Hoggard Aff. 7) Hoggard, who is 52 years of age, contends that Smiarowski was eliminated from consideration because "she lacked current and/or relevant experience, other candidates possessed superior qualifications, and/or the positions were never filled by [defendant]." (Hoggard Aff. 6)

After Philip Morris declined to hire her, Ms. Smiarowski filed a joint complaint with the New York State Division of Human Rights ("NYSDHR") and the Equal Employment Opportunity commission ("EEOC"), alleging that the defendant violated the New York State Human Rights Law and the ADEA (attached at Bloom Aff. Ex. E). The NYSDHR dismissed the complaint, finding that there was no probable cause to believe that the defendant engaged

in unlawful discrimination. (attached at Bloom Aff. Ex. F) Plaintiff then sought EEOC review of her NYSDHR Complaint, and the EEOC adopted the NYSDHR's findings. (Bllom Aff. Exs. G, H) Smiarowski then commenced this action, alleging that she was discriminated against on the basis of her age. (Bloom Aff. Ex. B). At her deposition, she acknowledged that her claim is premised on a single question in the on-line application, which requested an applicant to provided the "[y]ear you started working professionally." (Smiarowski Dep. At 75, 80-83)

Summary Judgment Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. It is the initial burden of a movant on a summary judgment motion to come forward with evidence on each material element of his claim or defense, demonstrating that he or she is entitled to relief. A fact is material if it "might affect the outcome of the suit under the governing law..." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The evidence on each material element must be sufficient to entitle the movant to relief in its favor as a matter of law. Vermont Teddy Bear Co., Inc. v. 1-800-Beargram Co., 373 F.3d 241,244 (2d Cir. 2004).

When the moving party has met this initial burden and has asserted facts to demonstrate that the non-moving party's claim cannot be sustained, the opposing party must "set forth specific facts showing that there is a genuine issue for trial,' and cannot rest on "more allegations or denials" of the facts asserted by the movant. Rule 56(e) Fed. R. Civ. P. In raising a triable issue of fact, the nonmovant carries only

"a limited burden of production," but nevertheless "must 'demonstrate more than some metaphysical doubt as to the material facts," and come forward with 'specific facts showing that there is a genuine issue for trial.'" Powell v. Nat'l Bd. Of Medical Examiners, 364 F.3d 79, 84 (2d Cir. 2004) (quoting Aslanidis v. Unted States Lines, Inc. 7 F.3d 1067, 1072 (2d Cir. 1993)).

An issue of fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. Caution is particularly warranted when considering a summary judgment motion in a discrimination action, since direct evidence of discriminatory intent is rare, and often must be inferred. Holtz v. Rockefeller & Co., 258 F.3d 62,69 (2d Cir. 2001). The Court must 'view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." Allen v. Coughlin, 64 F.3d 77, 79 (2d Cir. 1995) (quotations and citations omitted); accord Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,587-88 (1986). In reviewing a motion for summary judgment, the court must scrutinize the record, and grant or deny summary judgment as the record warrants. See Fed. R. Civ. P. 56 (c). In the absence of any disputed material fact, summary judgment is appropriate. Id.

Philip Morris served the plaintiff, who is proceeding pro se, with the notice explaining the manner in which a party may oppose summary judgment, as is required by Local Rule 56.2. I am mindful of the latitude afforded to a pro se party opposing a summary judgment motion. See Graham v. Lewinski, 848 F.2d 342, 344 (2d Cir. 1988) ("special solicitude" owed to pro se litigants opposing summary judgment); Shabtai v. U.S. Dep't of Education

2003 WL 21983025, at *5(S.D.N.Y. Aug. 20, 2003) (obligation to construe leniently pro se opposition papers on a summary judgment motion). However, a party's pro se status does not vitiate the requirement that triable issues of fact must be raised in order to defeat a summary judgment motion. Miller v. New York City Health & Hosp. Corp. 2004 WL 1907310, at *9 (S.D.N.Y. Aug. 25, 2004)

Discussion

Where there is no direct evidence of discrimination, the burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), determines whether a plaintiff's ADEA claim survives summary judgment. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000); Jetter v. Knothe Corp., 324 F.3d 73, 75 (2d Cir. 2003). First, the plaintiff must establish a prima facie case of age discrimination. Id at 75. If a prima facie case is established, then the burden shifts to the employer to set forth a legitimate, nondiscriminatory reason for the employment action. Id. Lastly, if the defendant has established a legitimate, nondiscriminatory reason for its action, the burden shifts back to the plaintiff to show that this stated rational is a mere pretext for discrimination. Id. At 75-76.

Defendant argues that summary judgment is appropriate because the plaintiff cannot establish a prima facie case of age discrimination. To establish a prima facie case of age discrimination, a plaintiff must show that he or she is a member of a protected class, qualifies for a position, suffered an adverse employment action, and that surrounding circumstances give rise to an inference of discrimination. Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466 (2d Cir.), cert. denied, 534 U.S. 993 (2001). The plaintiff bears the burden of making out a prima facie case. See Scaria v.

Rubin, 117 F.3d 652, 653 (2d Cir. 1997) (per curium). "the burden of establishing a prima facie case is not onerous, and has been frequently described as minimal." Id

The defendant argues that the plaintiff has not and cannot set forth a prima facie case of discrimination. First, the defendant contends that there is no evidence that the plaintiff was qualified for the positions that she sought, and thus is unable to raise a triable issue of fact as to her qualifications. The defendant cites to a series of rulings holding that an applicant's subjective opinion of her qualifications is insufficient, as a matter of law, to raise an issue of fact on this prong of the prima facie case. See, e.g., EEOC v Trans World Airlines, Inc., 544 F. Supp. 1187, 1219 (S.D.N.Y. 1982) (employee's testimony as to his or her own qualifications carries little weight in a summary judgment motion). Here, the movant has failed to set forth the criteria it applied when considering an applicant's job qualifications. In Scaria, for instance, the record before the district court permitted it to evaluate whether, as measured against IRS's hiring criteria, the plaintiff had raised a triable issue of fact as to whether [he/she] was qualified for a position with the IRS. 117 F.3d at 654-55. Similarly, in Williams v. R. H.Donnelley, Corp., 368 F.3d 123, 127 (2d Cir. 2004), the employer's hiring criteria for the position that the plaintiff sought was clear from the record. Here, Philip Morris has provided no such materials in the record. It argues that the plaintiff has not shown that she meets Philip Morris's hiring criteria, which the movant itself has not placed in the record. The only relevant evidence of the defendant's hiring criteria is contained in Ms. Hoggard's affidavit, which states the Ms. Smiarowski lacked current or relevant experience, other candidates had superior qualifications, and/or that the positions were never filled (Hoggard Aff. 6)

By contrast, the affidavit submitted by the plaintiff, with accompanying documentation, includes a detailed work and educational history. (Smiarowski Aff 19-21) Ms. Smiarowski's professional and academic background is extensive: she has a Master's Degree in accounting, an M.B.A. in finance, and worked for more than 15 years in fields including financial analysis (Smiarowski Aff. 15-17). Without further information as to the defendant's hiring criteria, the record before me would permit a reasonable jury to conclude that the plaintiff was a qualified job applicant. Consequently, I cannot rule that, as a matter of law, Ms. Smiarowski was not qualified for the positions she sought at Philip Morris.

Next, the defendant contends that the age-related request on its on-line job application is insufficient to give rise to an inference of discrimination, and that plaintiff has no other facts giving rise to such an inference. As noted, the application requests information as to the "[y]ear you started working professionally." (Bloom Aff. Ex.B). the job application did not directly request an applicant's age or date of birth. It also included fields in which an applicant could enter educational information, including year of graduation.1 (Bloom Aff. Ex. B) Plaintiff's action is premised on the contention that the form's request seeks impermissible information as to a job applicant's age, and that Philip Morris's decision not to extend a job offer to Ms. Smiarowski arose from discriminatory, age-based reasons. (Complaint at 4, Smiarowski Dep. At 12)

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1. Defendant contends that it was optional for the applicant to submit his or her year of graduation. That assertion is not supported by the version of the job application that was submitted on this motion, nor in the portion of Ms. Smiarowski's deposition that was cited by the defendant. (Bloom Aff. Ex. B; Def. 56.1 7; Smiarowski dep. At 95)

Other courts in this Circuit have held that a prospective employer's request of a job application for his or her date of birth does not, in itself, violate the ADEA. In Chudnovsky v. Prudential Securities, Inc., 2000 WL 1576876, at *8 (S.D.N.Y. Oct. 23, 2000) aff'd, 51 Fed. Appx. 901 (2d Cir. 2002), the court rejected an age discrimination claim anchored in an employer's request for an applicant's age, when the plaintiff's only other evidence supporting an inference of discrimination was a conclusory contention about the defendant's history of discriminatory practices, and a claim that the defendant had been previously sued for age discrimination. Id at *9. The court concluded that such evidence was insufficient to support a prima facie case of age discrimination. Id. 2 In the case before me, Ms. Smiarowski was asked at her deposition for evidence that she was subjected to discrimination on account of her age. Her response was that the question on the job application permitted Philip Morris to determine her age, and that she was qualified for the various positions. (Smiarowski Dep. At 76-77) Ms. Smiarowski, in response to the defendant's motion, has not set forth any additional facts that support her claim of age discrimination.

Other district courts have reached conclusions similar to Chudnovsky. In Landau v. Bolger, 1988 WL 69939, at *1 (E.D.N.Y. June 17, 1988), aff'd without opinion 867 F.2d 1424 (2d Cir. 1988)(table), the plaintiff alleged an ADEA violation arising out of defendant's failure to hire him for a position with the United States Postal Service. The district

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2 I note that in Chudnovsky, there was some additional evidence as to the defendant's interest in the plaintiff's age; plaintiff's age was discussed in his meeting with defendant's employees. 200 WL 1576876, at *9

court held that, without more, a request on a job application for the applicant's date of birth was insufficient to support an ADEA claim. Id at *3' see also Cady v. Miss Paige, Ltd., 2004 WL 1144044, at *5 (N.D. Ill. Apr. 30, 2004) ("plaintiff cannot maintain a cause of action for a per se violation of the ADEA simply because Miss Paige requires job applicants to disclose their high school attendance dates and/or graduations dates on an employment application.")

An EEOC regulation also provides that a request for a job applicant's age does not, in itself, establish a claim of age discrimination, though depending on surrounding facts it may constitute some evidence of discrimination:

> A request on the part of an employer for information such as "Date of Birth" or "State Age" on an employment application form is not, in itself, a violation of the Act. but because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act.

29 C.F.R. 1625.5 see also 29 C.F.R. 1625.4(b) (requesting an individual's age in "help wanted notices or advertisements" does not violate the ADEA, although such advertisements will be "closely scrutinized"). As the Seventh Circuit observed in Kralman v Illinois Department of Veterns' Affairs, 23 F.3d 150, 155 (7th Cir. 1994), [b]ecause the EEOC is the primary agency charged with implementing the ADEA, its interpretation is entitled to great deference."

In the face of defendant's motion, plaintiff has failed to come forward with any fact or circumstance that would

give rise to an inference of age discrimination, part of her minimal burden in establishing a prima facie case. The breadth and depth of an application's experience is a lawful area of inquiry. A more precisely tailored question might have sought the number of years of professional experience possessed by the applicant. Here, the defendant's inquiry was imprecise because a job applicant could have taken a hiatus from the workforce, and, thus, have experience that is both brief and out-of-date. But if age discrimination were the goal, the question would be a poor screen for older workers. By way of example, a person over age 40 and a person in his or her twenties each may have entered the professional workforce in 2001. I cannot conclude that the overly inclusive phrasing of the defendant's question, without any additional facts supporting an inference of discrimination, is sufficient to make out a prima facie case. Having scrutinized the overall content of the job application, and reviewed the record before me, there is no evidence that would permit a jury to infer that the challenged inquiry had an impermissible purpose.

The defendant received job applications via an external software program, BrassRing (Smiarowski Aff. Ex. 1A et seq) Ms. Smiarowski argues that the defendant should have either 1.) purchased a program from the same vendor that did not include questions as to when the applicant began working, or 2.) purchased a program from a different vendor that did not include this or similar questions. (Pl. Mem. at 1). Much of her opposition relies upon a contention that the software used by the defendant could have been configured so as to avoid any questions as to when a job applicant began working. (Pl. Mem. at 2-5) Such a contention, even when supported by evidence, does not raise a traiable issue of fact to any possible age-based discrimination. Without more, it is immaterial as to the underlying issue of whether any aspect

of the defendant's conduct supports an inference of age discrimination.

Because, in response to he defendant's motion, the plaintiff has not come forward with any facts that would rise to an inference of age discrimination, the defendant's motion for summary judgment is granted.

Conclusion

The defendant's summary judgment motion is GRANTED. The clerk is directed to enter judgment in favor of the defendant, and to dismiss this case.

SO ORDERED.

Signed by P. Kevin Castel

P. Kevin Castel
United States District Judge

Dated: New York, New York
July 5, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

WANDA J. SMIAROWSKI,
Plaintiff

04 Civ. 00074 (PKC)

-against-

JUDGMENT

PHILIP MORRIS USA INC.,
Defendant

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Defendant having moved for summary judgment pursuant to Fed. R. Civ. P 56, and the matter having come before the Honorable P. Kevin Castel, United States District Judge, and the Court, on July 5, 2005, having rendered its Memorandum and Order granting defendant's motion for summary judgment and dismissing the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated July 5, 2005, defendant's motion for summary judgment is granted and the case is dismissed; accordingly, judgment is entered in favor of the defendant.

Dated: New York, New York
July 6, 2005

J. MICHAEL McMAHON

Clerk of Court

BY: signed

Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTROPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of September, two thousand and six.

PRESENT: HON. RICHARD J. CARDAMONE,
HON. ROGER J. MINER,
HON. DENNIS JACOBS,

Circuit Judges.

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WANDA J. SMIAROWSKI,
Plaintiff

No. 05-6259-cv

-against-

PHILIP MORRIS USA INC.,
Defendant

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APPEARING FOR APPELLEE: ALLAN S. BLOOM, Paul, Hastings, Janofsky & Walker, LLP (Jacqueline M. Ceurvels, on the brief), New York, NY for Appellee.

Appeal from a judgment of the United States District Court for the Southern District of New York (Castel, J.) entered July 6, 2005.

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the district court is AFFIRMED.

Plaintiff Wanda Smiarowski claims that defendant discriminated against her on the basis of age in declining to interview or hire her. We assume familiarity with the facts, the procedural history, and the issues on appeal. This Court reviews a grant of summary judgment de novo. Mackey v. Bd. Of Educ., 386 F. 3d 158, 163 (2d Cir. 2004)

To survive summary judgment, Smiarowski must establish a prima facie discrimination case by adducing facts or circumstances giving rise to an inference of discrimination. Defendant's request for plaintiff's year of entry into the workforce – a question on work experiences – does not alone support such an inference.

For the foregoing reasons, the judgment of the district court is affirmed.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: signed by Richard Alcantara,
Richard Alcantara, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 Foley Square
NEW YORK 10007

Thomas Asreen
DEPUTY CLERK

Date: stamped date is December 4, 2006
Docket Number: 05-6259-cv
Short Title: Smiarowski v. Phill8ip Morris U.S.A. Inc.
DC Docket Number: 04-cv-74
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable P. Castel

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of December two thousand six.

Present:
Hon. Dennis Jacobs,
CHIEF JUDGE,
Hon. Richard J. Cardamone,
Hon. Roger J. Miner,
CIRCUIT JUDGES,

Smiarowski v. Phillip Morris U.S.A. Inc.

A petition for panel rehearing having been filed herein by Wanda Smiarowski,
Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

For the Court,
Thomas Asreen, Acting Clerk
By: signed by Tracy W. Young
Motion Staff Attorney

Searchable Fields

Hiresystem says "...a user can query on a particular **group of candidates**..." (Source: document provided by respondent Philip Morris to petitioner No. PM 00353)

Standard searchable fields in the Express 3.6 Software currently include:

First Name
Last Name
City
State
Zip
Country
Phone

Previous Degrees (up to 2)
Most recent Major
Previous Majors (up to 2)
Most recent School
Previous Schools (up to 2)
GPA (most recent)
Graduation Year (most recent)

Codes (Client Defined Resume Codes such as Source Code, Job Code, and Division Code)
Current Job Title

Years of Work Experience

Previous Job Titles (up to 4)
Current Employer
Previous Employers (up to 4
Most recent Degree

How Resume was Received (paper or Electronic)
Date Resume was added
Days since resume was added
Client-defined fielded data from Web Resume submission using Cut & Post

Source: document provided by respondent Philip Morris to petitioner No. PM 00357

BEST AVAILABLE COPY

Start Year:
End Year:
Company:
Position:
Responsibilities:

5
Start Year:
End Year:
Company:
Position:
Responsibilities:

Skills:

Additional Info:

Year you started working professionally.

Education

1
Grad Year:
Degree: N/A
School or University:
Areas of Study:
GPA:

2
Grad Year:
Degree: N/A
School or University:
Areas of Study:
GPA:

3
Grad Year:
Degree: N/A
School or University:
Areas of Study:
GPA: